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No. 89-1651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EUGENE D.., a minor, by and through his mother and next friend, OLIVIA D., - - Petitioner

versus

JOHN R. KARMAN, JR., MARGERY TAYLOR CHAPLEAU, SHERRY HAYDON BRUCE, MARY JOHNSTON BALLARD, MARCIA MILLER PUROL, PRUDA BIRD, ELLEN RECEVEUR WADE, and VICKY YOUNGMAN SCHWEICKHARDT, - Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether there was a clearly established constitutional right to protection from harm in foster care during the period of May 1, 1974 to December 6, 1982?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the Sixth Circuit Court of Appeals entered on November 13, 1989. That Opinion is reported at *Eugene D. By and Through Olivia D.* v. *Karman*, 889 F. 2d 701 (6th Cir. 1989).

COUNTERSTATEMENT OF THE CASE

This is a civil rights action brought under 42 U.S.C. 1983 by a severely mentally and physically handicapped child who has alleged that respondent social workers violated his constitutional right under the Fourteenth Amendment to the United States Constitution to be free from harm while in the custody and care of the State of Kentucky.

It is the position of the respondents (Karman) that there was (and is) no clearly established constitutional right to be protected from harm while in state foster care and therefore they are entitled to qualified immunity from liability.

Although the matter before this Court involves a pure question of law regarding whether there is a clearly established constitutional right to protection from harm while in foster care, Eugene's overall mischaracterization of what this matter involves as well as his misstatement of a number of facts, requires Karman to make certain corrections in order that this Court can make a proper disposition of the Petition for Writ of Certiorari.

As will be demonstrated, this case does not involve a situation in which a child was deprived of nutritional needs or medical care as Eugene would have the Court believe. Rather it involves a dispute over the proper care and treatment of a child who came into the care of the Kentucky Cabinet for Human Resources with a preexisting brain injury which caused him to be very severely or profoundly retarded, and also caused this child great difficulty in receiving proper nutrition and in gaining weight.

Factual Background

Eugene Douglas had no physical disabilities whatsoever when he was born August 30, 1973. (Dr. Sofia Franco deposition pp. 5, 6) (R. Nr. 77). On February 7, 1974, Eugene was taken by his mother to the Louisville General Hospital (Olivia D. deposition p. 4) (R.Nr. 84), in an epileptic coma and suffering from constant seizures. (Franco deposition p. 7). According to pediatric neurologist, Dr. J. William Holmes, the head trauma that he suffered at this time along with cardiorespiratory arrest

caused Eugene's neurological impairment which Dr. Holmes described as very severe or profound. (Dr. J. William Holmes deposition pp. 10, 11) (R.Nr. 96). Upon his discharge from the hospital on March 14, 1974, his final diagnosis was a cerebral contusion and possible skull fracture at the base of the skull. (Franco deposition p. 7). After an approximate 6 week stay at a convalescent home, Eugene was placed in foster care in the home of Blanche Smith on May 1, 1974. He remained there until December 6, 1982 when he was placed in the foster home of Judy Harrison. (Judy Harrison deposition p. 8) (R.Nr. 74). It is this eight and one-half year period that is the relevant time period for purposes of determining whether there was a clearly established constitutional right to protection from harm in foster care.

At page 3 of his Petition, Eugene alleges that on the day of his removal from the Smith foster home he was found to be suffering from starvation and that the pediatrician who saw Eugene on this day told officials that any type of infection would have led to his death in a matter of days. That pediatrician, whose name is Dr. Betty Wolf, testified that on this day, December 6, 1982, Eugene was not in a life-threatening situation; (Dr. Betty Wolf deposition p. 18) (R.Nr. 71); that he was not suffering from any kind of infection, dehydration, abrasions, bedsores or vomiting, (Wolf deposition p. 15); and though she was aware of her duty as a physician to report any case she believed to constitute the possibility of abuse or neglect, she did not make such a report in this instance. (Wolf deposition, p. 17, 18). Moreover, rather than suffering from starvation, Dr. Wolf stated that she believed Eugene was malnourished when she saw him in December, 1982 at the weight of 17 lbs. 4 oz. (Wolf deposition p. 22). In

addition, when she was advised of his weight range of between 20 lbs. 14 oz. and 22 lbs. 11 oz. at various times in 1984 and 1985 when Eugene was back in his mother's care, Dr. Wolf was of the opinion that Eugene was still malnourished. (Wolf deposition pp. 73-77).

It should also be noted that Judy Harrison, who cared for Eugene after his removal from the Smith foster home from December 1982 through December 1983, testified that Eugene's weight leveled off at 21-22 lbs. during this period. (Harrison deposition p. 31). Thus, Eugene's statement at page 7 of the Petition that he weighed 26 lbs., nine months after his removal from the Smith foster home while somewhat accurate,[1] failed to advise the Court that this weight gain was not maintained for any length of time. In fact, from January 1984 through April 1986, while in his mother's care, Eugene's weight never rose above 22 lbs. 12 oz. and sunk as low as 19 lbs. 9 oz. (Trudi Bellou deposition pp. 15, 16, 28) (R.Nr. 73). This lack of weight gain occurred despite the efforts of Trudi Bellou, a nutritionist with the Louisville Jefferson County Health Department, who worked with Eugene to improve his weight from March 1984 up through the time of her deposition in May 1986. Ms. Bellou agreed with Dr. Wolf that based on his weight during this period, Eugene was malnourished. (Bellou deposition p. 36).

Finally, in April 1986, because, according to Ms. Bellou, everything else had been tried "to enhance oral intake and weight gain" (Bellou deposition p. 30) a gastrostomy tube was inserted surgically in Eugene's abdomen to make it easier to feed him and avoid infections. (Dr. Lawrence

[1]The deposition of Betty Wolf indicates this weight was achieved in May, 1983 or five months rather than nine months after his removal. (Wolf deposition p. 74).

Jones deposition p. 21) (R.Nr. 97). This procedure followed a barium swallow esophogram performed in December 1985 which showed that Eugene suffers from "considerable muscular incoordination in initiating the swallow mechanism." (Bellou deposition p. 26). The gastrostomy tube is a rubber catheter that is inserted through the abdominal wall and connects to the inside of the stomach and is secured there. Food is then poured directly through the tube into the stomach. (Jones deposition p. 22). Three months after insertion of the tube, in mid-September 1986, Eugene weighed approximately 40 lbs. (Holmes deposition p. 23), or almost twice the 20 lbs. 13 oz. he weighed on April 17, 1986 shortly after the tube was inserted. (Holmes deposition p. 21).

Thus, a fair representation of the facts demonstrates that three years after his removal from the Smith foster home, Eugene had shown only a slight weight gain and the very doctor Eugene relied upon in his Petition to this Court, testified that Eugene was still malnourished during this three year period despite the assistance of a nutritionist. Furthermore, the nutritionist, Trudi Bellou, admitted that the gastrostomy tube, which produced a rapid weight gain, was used because all else had failed. This hardly describes a situation where a child was deprived of nutrition. Rather it illustrates a profoundly retarded child's problems in receiving sufficient nutrition.

Eugene has also alleged that his medical needs were continually neglected. (Petition p. 5). The record shows that while in the Smith foster home, Eugene was seen nineteen times at the Children and Youth Project, (C & Y Clinic), which is a state funded medical clinic whose mission is "to provide comprehensive health care to high-risk infants and children born either premature or high risk

or indigent status." (Franco deposition pp. 4, 10, 11). He was seen by a nutritionist at the C & Y Clinic on nine occasions and the nutritionist also made seven home visits to Eugene. The basis for this monitoring was Eugene's profound retardation and difficulty in gaining weight. (Franco deposition p. 14).

The home visits were discontinued only when Eugene enrolled in Churchill Park School in February 1978. Churchili Park School, which Eugene attended until he left for the Harrison foster home in December, 1982, is a school specifically designed for severely and profoundly handicapped and retarded children. (Frederick J. Goeschel deposition p. 3) (R.Nr. 80). While at Churchill Park School, Eugene daily received at least 15 minutes of exercise prescribed for the contractures he suffered from as a result of his condition. (Candace Harwell deposition p. 5) (R.Nr. 78).

While in Ms. Smith's foster home, Eugene was also seen at United Cerebral Palsy Clinic a total of fifteen times. (Dr. Walter E. Badenhausen deposition pp. 4-17) (R.Nr. 107). Dr. Badenhausen, an orthopedic surgeon and Medical Director of the United Cerebral Palsy Clinic, (Badenhausen deposition pp. 2, 4), testified that Eugene had surgery in March 1982 to relieve his contractures, but it was unsuccessful. (Badenhausen deposition p. 13). He also noted that even though Eugene missed some appointments at the Clinic, he was seen regularly. (Badenhausen deposition p. 29). As for the demineralization of Eugene's bones alluded to by Eugene at p. 7 of his Petition, Dr. Badenhausen stated that he would expect the bones of such a child to be "very, very osteoporotic" because they do not bear weight. (Badenhausen deposition p. 19).

At p. 5 of the Petition, Eugene has alleged that no investigation of his broken leg in August 1976 was ever conducted. This is simply not borne out by the record. First of all, the physician who examined Eugene did not express an opinion one way or the other as to whether it was an accident, (Franco deposition p. 34), but rather requested an investigation only "to be certain that the story was correct." (Franco deposition p. 32). Secondly, a letter from Sherwin L. Spero, Chief Social Worker at the C & Y Clinic, dated September 2, 1976, shows that Mr. Spero referred the matter to a county agency, the Metropolitan Social Services Department, rather than the Cabinet for Human Resources. (R.Nr. 109 Children & Youth Clinic Records attached as Exhibits to deposition of Rose Gorke, Custodian of Records.). (Franco deposition p. 33). Moreover, a service recording made by the social worker at the time, Mary Johnston Ballard, demonstrates that she immediately followed up a conversation with Mr. Spero regarding the incident with a home visit to discuss the situation wth Ms. Smith. (Deposition of Mary Johnston Ballard, Exhibit 1) (R.Nr. 53).

Eugene alleges at p. 5 of his Petition that medical professionals began to suspect that Ms. Smith was using improper techniques in feeding Eugene. What he does not tell this Court is that these same medical professionals, the C & Y Clinic personnel, changed their mind and concluded that the techniques Ms. Smith had been using were correct after all and that they had been wrong! (Franco deposition pp. 16,17).

Eugene implies at p. 6 of his Petition that complaints from Churchill Park School personnel went unheeded. However, the testimony of Margaret Frederick, who in-

vestigated this allegation following a complaint by Judy Harrison, found that these reports:

> . . . were, in fact, heeded and that every allegation that came to the attention of the Department's workers was addressed. Home visits were made to observe Eugene's condition, to talk with Mrs. Smith. Anytime the allegation indicated a medical problem or an impact on the child's physical health, then a subsequent contact was made with the medical community who were addressing Eugene's physical needs.
>
> Margaret Frederick deposition p. 10 (R.Nr. 83).

Eugene also attempts to blame "defendant social workers" for taking two years to obtain a wheelchair for Eugene. (Petition pp. 5, 6). According to Judy Harrison, Eugene's foster parent from December, 1982 to December, 1983, this wheelchair was ordered by a therapist at Churchill Park School which is not affiliated with the Cabinet for Human Resources. (Harrison deposition p. 30).

Thus, a fair representation of the facts regarding Eugene's medical needs shows that he was not deprived of medical care during his stay in Blanche Smith's foster home as he has alleged.

REASONS FOR DENYING THE PETITION

In rendering its decision that respondents were entitled to qualified immunity from liability because there was no clearly established constitutional right to protection from harm in foster care during the period of May 1, 1974 to December 6, 1982, the Sixth Circuit properly applied the principles governing qualified immunity set forth by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and *Anderson* v. *Creighton*, ___

U.S. ___, 107 S. Ct. 3034 (1987). Because the Sixth Circuit properly applied the law with regard to such concepts as the level of specificity at which a constitutional right must be defined and the factual similarity necessary between cases to clearly establish such rights, there is no conflict between its decision and those of the Supreme Court or other Circuits.

Additionally, the approach taken by the Sixth Circuit with respect to caselaw outside the Sixth Circuit is consistent with the "objective legal reasonableness" test of *Harlow, supra,* and does not represent a substantive difference from other circuits' approaches.

This Court's opinion in *DeShaney* v. *Winnebago County Department of Social Services,* ___ U.S. ___, 109 S. Ct. 998 (1989), which clarified the law regarding the rights of foster children, was not misread by the Sixth Circuit or other circuits that have interpreted this decision. As such, there is no need to review this case in light of *DeShaney.*

DeShaney did establish an affirmative duty of protection standard that can be applied to situations involving persons in state custody. However, because this decision was not made until February 22, 1989 and because the law must be clearly established as of the time of the events in question, a decision in this matter that would clearly establish that a constitutionally imposed affirmative duty of protection exists in foster care could not apply to *Eugene D.* whose relevant time period ended on December 6, 1982. Therefore, review of the *Eugene D.* case by this Court would not be appropriate.

I

The Sixth Circuit's Characterization of the Level of Specificity Necessary to Clearly Establish a Constitutional Right Does Not Conflict with This Court's Holding in *Anderson* v. *Creighton*.

There is no conflict between the Sixth Circuit's decision in *Eugene D.* v. *Karman*, 889 F. 2d 701 (6th Cir. 1989) and *Anderson* v. *Creighton*, ___ U. S. ___, 107 S. Ct. 3034 (1987) because the Sixth Circuit applied the principles regarding the level of specificity at which a constitutional right is clearly established in a manner consistent with the *Anderson* case's application. In both cases, the Courts found three levels of specificity. On the first level was the basic constitutional guarantee, such as the right to due process. The second level consists of a general constitutional right that springs from the basic right. The third level involves the circumstances where the right is applied and the right becomes particularized.

Using the Due Process Clause as an example, this Court in *Anderson* noted that the right to due process is "quite clearly established by the Due Process Clause." *Id.* at 3038. The Court then pointed out that any action which violates the Due Process Clause in a sense violates a clearly established constitutional right regardless of how unclear it is that the particular action is a violation. *Id.* at 3038. However, the Court stated that if this was the level at which a clearly established right was to be found, "it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow." *Id.* at 3039. This is the first and most abstract level of the clearly established law analysis. In applying this analysis to the facts in *Anderson*, this most abstract level is found in the Fourth

Amendment's proscription against unreasonable searches and seizures. The second level, in which a general constitutional right is found to emanate from the basic right, is the right to be free from warrantless searches of one's home unless there was probable cause and exigent circumstances. *Id.* at 3039. The third level, which this Court believed was sufficiently particularized, and thus able to put a reasonable official on notice that he was violating a constitutional right, required an examination of the circumstances facing the searching officer when he made the warrantless search. *Id.* at 3040.

The Sixth Circuit, in analyzing Eugene's claim that his right to due process under the Fourteenth Amendment had been violated, adopted this same three level approach. First of all, the right to due process, guaranteed by the Fourteenth Amendment, as this Court pointed out in *Anderson* is the first and most abstract level. The Sixth Circuit, citing this Court's decision in *DeShaney* v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S. Ct. 998 (1989), recognized that the second level, which stems from the more basic right to due process, was the right in certain instances to protection from harm while in state custody. However, the Sixth Circuit found that for a right to be sufficiently particularized so as to put a reasonable social services official on notice that he or she was violating a constitutional right, it must reach a third level where the circumstances under which this right of protection while in state custody are identified. The Sixth Circuit, in *Eugene D.*, pursuant to *DeShaney* at 1005, concluded that at this level the right to such protection had been clearly established only in the institutional and prison settings prior to December 6, 1982, *supra* at 710-711. Thus, rather than extend official immunity beyond the bounds of

reason and common sense, the Sixth Circuit properly applied the principles set forth in *Anderson, supra,* in determining the right argued by Eugene has not yet been clearly established in the foster care setting.

II.

The Sixth Circuit's Decision in *Eugene D.* Does Not Conflict with *Anderson* v. *Creighton* or *Harlow* v. *Fitzgerald* Regarding the Need for Factual Similarity.

Eugene greatly overstates the case when he argues that the Sixth Circuit required "factual circumstances virtually identical" to the *Eugene D.* case in order to defeat the claim of qualified immunity. As noted in the preceding section, the Sixth Circuit followed the *Anderson* decision *supra,* by requiring that a general constitutional right, such as protection from harm while in state custody, be particularized by setting forth the circumstances under which such a right applies before declaring that right to be clearly established. Under the "objective legal reasonableness" standard of *Harlow, supra,* the Sixth Circuit in *Eugene D.* did not find that the institutional setting described in *Youngberg* v. *Romeo,* 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) or the prison setting of *Estelle* v. *Gamble,* 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) would put a reasonable social services official on notice that he was violating a constitutional right. At 711, the Sixth Circuit in *Eugene D.* states that:

> At some later date our circuit or the Supreme Court may definitively decide whether the placement of a child in a state licensed foster home which is supervised by state agents is sufficiently analogous to institutionalization to give rise to a constitutionally imposed affirmative duty to protect. However, we are convinced

> that the differences are sufficient to require us to hold under an objective legal reasonableness standard, that it was not clearly established at any time during the relevant period that such an obligation existed by virtue of the Constitution.

The Sixth Circuit followed this passage with the statement that for similar reasons, it also found no such duties in the Eighth Amendment setting of *Estelle, supra.*

Clearly, all the Sixth Circuit requires here is that the factual setting be recognizable to social service personnel. This degree of similarity to the case at hand can hardly be characterized as requiring virtually an identical fact situation. Rather, the Sixth Circuit, by refusing to accept the "distinct contexts" of institutionalization or prison as sufficient notice to social workers, followed this Court's admonition in *Anderson* not to allow plaintiffs "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability. . ." *Id.* at 3039.

III.

The Sixth Circuit's Decision in *Eugene D.* Does Not Conflict with the Approach of the Third, Eighth and Tenth Circuits on the Determination of Whether the Law is Clearly Established.

Eugene cites several cases collected from the Third, Eighth and Tenth Circuits as adopting an approach which he contends is in conflict with the approach taken by the Sixth Circuit in determining whether a legal rule is clearly established. He describes this approach as "requiring some but not precise factual correspondence and demanding that officials apply general well-developed legal principles." (Petition at 19.)

Although the Sixth Circuit has not repeated this formula verbatim, the Court's approach is unquestionably consistent with these other Circuits' approach. The fact the Sixth Circuit in *Eugene D.* indicates that only the broad question of whether placement in a foster home supervised by state agents would impose a constitutional duty of protection need be decided by this Court or the Sixth Circuit before applying to a situation like Eugene's demonstrates that the Sixth Circuit does not require the precise correspondence of facts that Eugene alleges. In requiring that the setting at least be that of foster care, the Court is following the holdings in *Anderson, supra* and *Harlow, supra* regarding the "objective legal reasonableness" standard and the level of specificity or factual similarity necessary for an official to be put on notice that what he or she is doing violates a clearly established constitutional right. A precise correspondence of facts would consist of a child in foster care with severe medical problems like Eugene who allegedly does not receive appropriate care and treatment for these problems. The Sixth Circuit decision in *Eugene D.* cannot in any way be read to require such similarity.

IV.

No Precise Rules are Necessary Nor Is There Any Substantive Conflict Between the Circuits in Evaluating the State of the Law for Purposes of Qualified Immunity.

Eugene argues that no precise rules have been set forth to determine what precedent should be used in deciding whether a constitutional right is clearly established. He points to *Harlow* v. *Fitzgerald, supra,* as reserving this question at 457 U.S. at 818, 102 S. Ct. at 2738 n. 32 when the Court stated that: "[a]s in *Procunier* v. *Navarette* we

need not define here the circumstances under which 'the state of the law' should be evaluated by reference to the opinions of this Court, of the Court of Appeals or of the local District Court." (Petition at p. 21.) However, the fact that this Court in *Procunier* v. *Navarette,* 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978) required an "evaluation" of the state of the law in determining whether a right is clearly established, suggests that precise rules would not be appropriate for such a determination. In fact, there is a need for flexibility in evaluating the state of the law because seldom, if ever, do facts present themselves in the same way in two different cases nor do Courts analyze facts in the same manner. Imposing precise rules to govern the determination as to whether a legal rule is clearly established would be unduly restrictive and impractical.

With respect to the evaluation of the state of the law, Eugene has cited *Wood* v. *Ostrander,* 879 F. 2d 583 (9th Cir. 1983) as using an approach that conflicts with the approach used by the Sixth Circuit in deciding *Eugene D.* Eugene thus believes that review by this Court is necessary to resolve the conflict. As the ensuing discussion will demonstrate, it is the description of the evaluation method that is different not the approach itself.

In *Eugene D.,* the Sixth Circuit used a broad and balanced approach. When reviewing decisional law, the Court looked first and most importantly to the decisions of the Supeme Court and then to those of the Sixth Circuit. If guidance was not available in these sources, the Court looked to decisions of other circuits and then to decisions of the highest state court. Recognizing that the law must be *clearly* established, the Sixth Circuit concluded that a single case from another circuit would not be sufficient to

satisfy this standard. *Id.* at 706. However, such an approach does not foreclose the use of decisions of other circuits and in fact takes into consideration state law decisions as well.

In *Wood,* the Ninth Circuit pointed out that a factually similar decision from another Circuit, *White* v. *Rochford,* 592 F. 2d 381 (7th Cir. 1979)[2] "did not necessarily establish law for this circuit." *supra* at 593. Only after noting that the Seventh Circuit's decision in *White* had *established* the point of law regarding a police officer's creation of a danger to individuals; that two subsequent cases from the Seventh Circuit had *"clearly articulated"* the law, *Id.* at 594; and that a decision from the Ninth Circuit, *Escamilla* v. *City of Santa Ana,* 796 F. 2d 266 (9th Cir. 1986) had cited one of the Seventh Circuit decisions with approval, did the Court in *Wood* conclude that the law was clearly established at the time of the events in its case and that it would have come to the same result as the Seventh Circuit in *White.*

Thus both the Court in *Eugene D.* and in *Wood* looked to other circuits for guidance in the absence of Supreme Court authority or similar cases in their circuits. The mere fact that the Ninth Circuit has chosen to describe its process as looking at whether it would have decided a similar case the same way another circuit had decided a previous matter presents no substantive difference from the Sixth Circuit looking to other circuits for guidance in determining whether the law was clearly established.

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[2]Both cases involved a police officer who arrested the driver of a car and then left the occupants of the car to fend for themselves. In *Wood,* it was a woman while in *White* it was children.

V.

District Court Decisions from Foreign Jurisdictions Do Not Clearly Establish Constitutional Rights.

Eugene has also argued that certain District Court decisions, *Brooks* v. *Richardson,* 478 F. Supp. 793 (S.D. N.Y. 1979) and *Gary W.* v. *State of Louisiana,* 437 F. Supp. 1209 (E.D. La. 1976) were ignored by the Sixth Circuit in *Eugene D.* (Petition at p. 12.) Eugene fails to point out that as for such cases' precedential value, he himself has argued that only local District Courts were to be consulted with reference to the state of the law at the time in question. In his Response to Defendants' Motion to Dismiss, R.Nr.14, filed January 16, 1985 with the U.S. District Court for the Western District of Kentucky, Eugene argued at pp. 26-27, that: "[d]etermination of the state of the law at the time of the acts or omissions complained of is to be made by 'reference to the opinions of (the Supreme) Court, of the Courts of Appeals, (and) of the *local District Court.' Procunier* v. *Navarette,* 434 U.S. 555, 565 (1978)" (emphasis added). In line with this Court's statement in *Procunier* is the analysis by the Sixth Circuit to the effect that the "objective legal reasonableness" test of *Harlow* "does not require state officials to know and follow the most advanced state of the law as established by a remote court of the land." *Eugene D.* at 708.

VI.

DeShaney v. *Winnebago County Department of Social Services* Clarifies Rather Than Confuses the Law Regarding the Constitutional Rights of Foster Children.

Eugene argues at p. 26 of his Petition that review by this Court is necessary because the *DeShaney* decision

caused confusion among circuits who have misread the case as having decided an issue on which the court has explicitly expressed no opinion, i.e. the validity of the analogy between foster care and incarceration and institutionalization. Such an assertion clearly does not apply to the *Eugene D.* decision. On the contrary, the Sixth Circuit's explicit statement at 711 that at some later date, either the Sixth Circuit or the *Supreme Court* could definitively decide whether foster care placement is sufficiently analogous to institutionalization to give rise to an affirmative duty of protection provides incontestable proof of the inaccuracy of Eugene's statement.

The same can also be said of both *Milburn* v. *Anne Arundel County Department of Social Services,* 871 F. 2d 474 (4th Cir. 1989) cert. denied ___ U.S. ___, 110 S. Ct. 148 (1989) and *Stoneking* v. *Bradford Area School District,* 882 F. 2d 720 (3rd Cir. 1989) cert. denied sub nom. *Smith* v. *Stoneking,* ___ U.S. ___, 110 S. Ct. 840 (1990) which Eugene also cited. In both instances, the Courts noted that the Supreme Court expressed no opinion as to the validity of the analogy between foster care and institutionalization and incarceration, *Milburn* at 476 and *Stoneking* at 724.

With respect to *Taylor* v. *Ledbetter,* 818 F. 2d 791 (11th Cir. 1987) (en banc) cert. denied ___ U.S. ___, 109 S. Ct. 1337 (1989), which Eugene admits at p. 20 of his Petition did not involve the issue of qualified immunity, it is obvious that *DeShaney* did not confuse the Eleventh Circuit because it made its decision well before *DeShaney* was decided.

Eugene apparently is trying to imply some confusion on the part of the Sixth Circuit when he notes at p. 24 of his Petition that the Sixth Circuit rejected case law cited by Eugene after the Court acknowledged in its opinion that

DeShaney had made clear that cases cited by Eugene "can be read to support his assertion that the Due Process Clause of the Fourteenth Amendment imposes affirmative duties on the state whenever it takes an individual into custody" *Eugene D.* at 709. What Eugene fails to note is that the Sixth Circuit properly held that with regard to Eugene's case this "explicit statement" of the Court in *DeShaney* could not be relied on "to establish such obligations during a period ending some six years earlier." *Id.* at 710. Additionally, the Sixth Circuit pointed ont that the "gloss" that *DeShaney* applied to case law cited by Eugene was obviously not available to the defendants in the relevant time period of May, 1974 to December, 1982. *Id.* at 710.

Moreover, rather than confuse, Karman believes the *DeShaney* case has done much to clear up the law in this area. First of all, the Court laid down a general right and duty emanating from the Due Process Clause of the Fourteenth Amendment, i.e. an affirmative duty of protection when the state takes a person into custody and holds him there against his will. Secondly, by noting that only in the circumstances of incarceration and institutionalization did the Constitution impose "upon the State affirmative duties of care and protection with respect to particular individuals" *Id.* at 1004-1005, the Court particularized the right to protection so that it was clearly established in those two instances. Thirdly, this Court did not extend such a right and corresponding duty to the foster care setting during the course of its opinion in *DeShaney*. As evidenced by its statement at 1006, fn. 9, this Court expressed no view on the validity of the analogy between foster care and incarceration and institutionalization.

The clarity of *DeShaney* is further demonstrated by the similar results reached in *Eugene D.* and *Doe* v. *Bobbitt*,

881 F. 2d 510 (7th Cir. 1989). These are the only two cases cited by Eugene that fit within the foster care situation described in *DeShaney* at 1006, fn. 9, i.e. "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home . . ."[3] In both instances, the Courts concluded that there was no constitutional right to protection from harm in foster care that had been clearly established either by December, 1982 in *Eugene D.* or by 1984 in *Doe*. It is thus clear that *DeShaney* presents no basis to review *Eugene D.*

VII.

Eugene D. v. *Karman* is Not an Appropriate Case to Determine Whether There Is A Constitutional Right To Protection From Harm in Foster Care.

The *DeShaney* case's announcement that in certain circumstances there is an affirmative duty of protection when the state takes a person into custody and holds him there against his will provides the standard by which this Court can determine whether there exists a clearly established constitutional right to protection from harm while in foster care when the appropriate case is presented to it. Such a case would be appropriate if any part of the time period in question involved events occurring after February 22, 1989 when *DeShaney* was decided. Before that time there was not identifiable standard or general constitutional duty that could be applied to all situations when a person was taken into state custody. Such a standard makes it possible

[3]The other cases cited by Eugene, *Milburn* v. *Anne Arundel County Department of Social Services*, *supra* and *Stoneking* v. *Bradford Area School District*, *supra* are distinguishable. *Milburn* involved a child who was voluntarily placed in a foster home by his parents while *Stoneking* dealt with harm directly inflicted by a state employee.

for this Court or a lower court to determine the existence of a constitutional right in the foster care setting based on the state of the law on February 22, 1989. As the events in question in the *Eugene D.* case took place between May 1, 1974 and December 6, 1982, it is not an appropriate case to answer such a question.

CONCLUSION

For the reasons stated above, Respondents pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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